OBERTHUR TECHNOLOGIES OF AMERICA CORPORATION, Respondent	
and	Case Nos. 04-CA-128098 04-CA-132055
LOCAL 14M, DISTRICT COUNCIL 9, GRAPHIC COMMUNICATIONS CONFERENCE/ INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Charging Party	04-CA-134781 04-CA-158860

CHARGING PARTY'S ANSWERING BRIEF TO RESPONDENT'S CROSS-EXCEPTION

Pursuant to 29 C.F.R. § 102.46(f)(1), Local 14M, District Council 9, Graphic Communications Conference/International Brotherhood of Teamsters ("Union") submits this answering brief to Oberthur Technologies of America Corporation's ("Employer") cross-exception to the decision of Administrative Law Judge Arthur Amchan.

I. FACTS[1]

The Board conducted a secret-ballot election to determine whether a stipulated unit of the Employer's employees wished to be represented by the Union on September 7, 2012. A determinative number of ballots were challenged. On February 20, 2013, Administrative Law Judge Raymond P. Green resolved those challenges, determining that a majority of eligible voters cast ballots in favor of being represented by the Union. (GC Exh. 2).

On March 11, 2013, the Union sent a letter to the Employer demanding to bargain (1) a collective bargaining agreement and (2) over any changes the employer might consider making while appealing Judge Green's decision, including employee discipline. That letter states:

[1] In accordance with the Board's Rules, the Union only recounts those facts that are "material" to resolving the Employer's lone cross-exception. 29 C.F.R. § 102.46(c)(1), (f)(1).

> This letter serves as a "Demand to Bargain" notice to the [Employer] concerning the wages, benefits and working conditions of production employees at Oberthur Technologies.
>
> …
>
> This Union stands ready and willing to meet with the [Employer] at a time and place mutually acceptable to bargain and come to terms on a Collective Bargaining Agreement covering production employees.
>
> Should the [Employer] file exceptions to the ALJ's decision, it is the position of the Union that any unilateral changes by the [Employer] pertaining to terms and conditions of employment or with respect to the issuance of discipline without first providing the Union with notice and the opportunity to bargain over those changes is an attempt to unlawfully change, alter or eliminate those terms and conditions of employment and will be met by the Union pursuing legal remedies available it for the violation of law.

(GC Exh. 2(a)).

In response, the Employer categorically informed the Union that it would not bargain at all until its intended appeal to the Board of Judge Green's resolutions of the challenged ballots was finally resolved. The Employer's March 15, 2013 response letter to the Union reads, in relevant part:

> As you may know, the Company intends to appeal the ALJ's decision to the NLRB, as we believe that the decision is both factually and legally incorrect. Until those issues are finally resolved on appeal, the ALJ's decision is not final and the Company has no obligation to bargain until that occurs.

(GC Exh. 2(b)).

The Employer terminated bargaining unit member Albert Anderson on February 4, 2014. The Employer did not notify the Union prior to discharging Anderson, nor did it notify the Union of the discharge after the fact. Instead, the Union learned of the discharge from Anderson himself after the discharge had been imposed. (Tr. 27). On March 13, 2014, the Union sent a request to the Employer for information relating to the discharge (GC Exh. 5). The

Employer acknowledged receipt of this request on March 18, 2014 (GC Exh. 6) but did not provide information until July 17, 2014, more than four months after the request (GC Exh. 7). The Employer gave no explanation for the delay. The Employer closed its July 17, 2014 response by making clear that "[t]he fact that [the Employer] ha[s] provided this detailed response to your March 13, 2014 letter should in no way be construed that [the Employer] has any duty to provide this information to you in the future" (GC Exh. 7). The Union filed its charge alleging that the Employer violated Section 8(a)(5) of the Act by failing to bargain over Anderson's discharge on May 5, 2014 (GC Exh. 1).

The Employer discharged bargaining unit members Harvey Werstler and Dan Clay on July 14, 2014 (Tr. 30-31) for allegedly having a heated altercation with one another at work that included shoving (Tr. 78). Respondent did not provide the Union with any notice of the discharges at any point. Instead, the Union learned of the discharges from Werstler after the fact. (Tr. 31). On July 24, 2014, the Union requested information regarding Clay's and Werstler's discharges (GC Exh. 8). The Employer provided information relating to the discharges on August 11, 2014, but again concluded its response by stating "[t]he fact that [it] ha[s] provided this detailed response to [the Union's] July 24, 2014 letter should in no way be construed that [it] has any duty to provide this information to [the Union] in the future" (GC Exh. 9). The Union filed its charge alleging that the Employer violated Section 8(a)(5) of the Act by failing to bargain over Clay's and Werstler's discharges on August 14, 2014 (GC Exh. 1).

The Employer discharged bargaining unit member Lawrence Bennethum on July 22, 2015 for allegedly making a racially insensitive comment (Tr. 34; 60-61). The Employer again did not provide the Union with any notice of the discharge at any point. Instead, the Union learned of the discharge from Bennethum after the fact. (Tr. 34-35).

On August 27, 2015, the Board agreed with Judge Green regarding resolution of the Union's challenges and certified the Union (GC Exh. 2). On September 1, 2015, the Union sent another letter to the Employer demanding to bargain "concerning the wages, benefits and working conditions of production employees" (GC Exh. 3). The Employer sent a letter in reply on September 22, 2015 in which it again categorically refused to bargain with the Union:

> [The Employer is] in receipt of your September 1, 2015 demand to bargain. However, [the Employer] does not believe that the Board decision issued on August 27, 2015 is correct and in accordance with prior Board law with regard to the unit determination and who was eligible to vote in that election. Accordingly, [the Employer] respectfully declines [the Union's] offer to bargain over the terms of a new collective bargaining agreement.
>
> [The Employer] intends to challenge the Board's decision with regard to the certification of [the Union] and the underlining [sic] ULP's in the courts and, as a result, will not negotiate unless and until this matter is finally resolved on appeal.

(GC Exh. 4).

The Union requested information relating to Bennethum's discharge on October 9, 2015 (GC Exh. 10). On October 19, 2015, the Union amended an existing charge to additionally allege that the Employer failed to bargain over the discharge of Bennethum in violation of Section 8(a)(5) (GC Exh. 1).

On July 27, 2016, with regard to a separate complaint involving these same parties and this same bargaining unit, the Board found that the Employer violated Sections 8(a)(5) and (1) by refusing to bargain with the Union and refusing to provide requested information. *Oberthur Technologies of America Corp.*, 364 NLRB No. 59 (2016). The Employer admitted in that proceeding that it was refusing to bargain with and provide information to the Union, but took the position that it did not violate the Act because the Board's resolution of the election ballot challenges was incorrect and the employees did not actually validly vote to be represented by the Union. *Id.*, slip op. at 1. And, in the present proceeding, it is undisputed that the Employer has

never recognized the Union as the representative of its employees—now just shy of four full years after the employees voted to make the Union their representative (Tr. 23).

II. THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

The Regional Director for Region 4 issued a Consolidated Complaint and Notice of Hearing encompassing the Union's charges as to the failure to bargain over the discharges of Anderson, Clay, Werstler, and Bennethum on October 27, 2015 (GC Exh. 1). A hearing was held before Judge Amchan on April 13, 2016, and the Judge issued his decision on June 16, 2016.

The Judge found that the Employer "violated Section 8(a)(5) and (1) by failing to provide notice and an opportunity to the Union to bargain over the terminations—at any time" (ALJD at 7). More specifically, the Judge found that, while the Employer did not commit an unfair labor practice by failing to provide the Union with notice and an opportunity to bargain over the proposed discharges prior to imposing them, it did commit an unfair labor practice by *never* bargaining over the discharges. The Judge thereby implied that the Employer could have satisfied its obligations under the Act by bargaining with the Union about the discharges after they took place; the Employer's fault, according to the Judge, was that it did not give notice and an opportunity to bargain before *or after* the fact.

The Judge rejected the Employer's contention that it did not violate the Act because the Union never specifically asked it to bargain over the discharges of Anderson, Clay, Werstler, or Bennethum. The Judge noted the following: (1) the Union had requested to bargain with the Employer over terms and conditions, including specifically over discipline, in its March 11, 2013 letter to the Employer, and that the Employer had categorically replied on March 15, 2013 that it would not bargain with the Union at all; (2) consistent with this categorical refusal, the Employer

had failed to notify the Union of any of the discharges at any point; and (3) even when it did respond to the Union's requests for information, it always closed by stating that it was not obligated to provide any information. In these circumstances, the Judge concluded, requesting to bargain over the discharges "would have been a useless endeavor" that the Union was not required to undertake. (ALJD at 8). It is to this portion of the Judge's decision, and to this portion only, that the Employer excepts—the Employer contends that the Judge should have decided that the Employer did not violate the Act because the Union did not specifically ask to bargain over the discharges of Anderson, Clay, Werstler, and Bennethum, and thereby waived its right to bargain over those discharges (Employer's Cross-Exceptions at 1).

III. QUESTIONS INVOLVED

1. Did the Judge err by declining to find that the Union waived its right to bargain over the terminations of Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum? This question relates to the Employer's first and only cross-exception.

Suggested answer: No, the Union was not obligated to make futile requests to bargain over the specific terminations because the Employer had already rejected, in categorical fashion, the Union's request to bargain over changes to terms and conditions of employment generally and over employee discipline in particular.

IV. ARGUMENT

Where an employer "refuses to negotiate over…discharges," it "engage[s] in conduct violative of Section 8(a)(5) of the Act."[2] *Ryder Distribution Resources, Inc.*, 302 NLRB 76, 90 (1991); *accord, N.K. Parker Transport*, 332 NLRB 547, 550-51 (2000) ("Under Sections 8(a)(5)

[2] The Employer concedes this. Employer's Brief at p. 8.

and 8(d), it is unlawful for an employer to refuse to bargain" over "termination of employment" or reinstatement of a discharged employee.).

However, "a union may waive its right to bargain about a mandatory subject"—including the termination of an employee—"if it does not request bargaining." *N.K. Parker*, *supra* at 551; *accord*, *Fresno Bee*, 337 NLRB 1161, 1187 (2002). But "there is no waiver if it is clear that a request would have been futile" because the employer has, in effect, already refused to bargain. *Ibid.* The Board has long held that a request to bargain is futile and unnecessary where the employer "has generally refused to recognize or bargain with the Union until a court of appeals enforces a prior Board Order directing [the employer] to do so." *Peat Manufacturing Co.*, 261 NLRB 240, 240 fn. 1 (1982) (employer violated the Act by failing to bargain over the layoff of a single employee; union was not obligated to request bargaining over that specific layoff where employer had previously informed union that it would not bargain at all pending its appeal of the union's certification); *accord Sunnyland Refining Co.*, 250 NLRB 1180, 1181 fn. 3 (1980) ("once a union requests bargaining and an employer states it is refusing to bargain in order to test the certification, it is futile and unnecessary for the union to continue to request bargaining"); *B.F. Goodrich*, 250 NLRB 1139, 1140 (1980) (even where there was no evidence that the union ever requested bargaining, where the employer "informed the [u]nion it had no duty to bargain with it because [the employer] believed the Acting Regional Director's findings…were erroneous" it "placed the Union on notice that a request for bargaining by the Union would have been futile and was therefore unnecessary" and refused to bargain in violation of the Act); *GAF Corporation*, 218 NLRB 265, 266 (1975); *Williams Energy Co.*, 218 NLRB 1080, 1080 fn. 4 (1975). In short, where an employer informs a union that it does not recognize the union and

will not bargain with it pending an appeal of an election, the employer will be held to its word.[3] By making a general declaration of this kind, the employer *has* refused the union's request to bargain over subsequent unilateral changes.

Accordingly, in *L. Suzio Concrete Company*, 325 NLRB 392, 392-93 (1998), the Board overruled the employer's election objections and certified the union as the representative of a unit of employees. *Id.* at 393. The employer categorically rejected the union's general bargaining demands, "informing the Union in effect that it was pursuing its appeals of the certification decision." *Id.* at 398. Then, in a subsequent letter to the union informing the union of its intention to assign unit work to nonunit employees, the employer stated that it still did not recognize the union as the representative of the employees. *Ibid.* The Board found, "in these circumstances"—where the employer has categorically refused to bargain with a union pending the appeals process and has reiterated in communications about the particular change at issue that it does not consider itself obligated to bargain with the union—"it would have been a futile gesture for the Union to specifically request bargaining about the removal of unit work." *Ibid*; *accord, N.K. Parker, supra* at 551 (where an employer has "made it clear" that it will not meaningfully bargain with a union about an employee's termination and possible reinstatement, the union need not make a "futile" request for bargaining for the Board to find that the employer has violated the Act).

[3] Any alternative to this rule would incentivize an employer to categorically inform a newly elected union that it will not bargain over any unilateral changes in order to lull the union into not making specific requests to bargain over subsequent unilateral changes. Then the employer could make unilateral changes with impunity, because the union, relying on the employer's pledge not to bargain, would not have made what it believed would be useless demands to bargain over the specific changes. This is what the Employer attempts to accomplish in the present matter. The Board has wisely crafted a rule that avoids this mischief, binding an employer who says it will not bargain to its declaration.

Here, Judge Amchan correctly found that the Employer refused to bargain over the four discharges and thereby violated Sections 8(a)(5) and (1). The Union was not required to make a futile demand for bargaining over the specific discharges; the Employer had already informed the Union that it would not bargain with it over any changes to terms and conditions of employment including discipline.

In this case, as in *L. Suzio*, *supra* at 398, the Union demanded to bargain over changes to terms and conditions of employment. In fact, the Union made an additional particular demand to bargain over the imposition of discipline. (GC Exh. 2(a)) (March 11, 2013 letter from the Union informing the Employer that "it is the position of the Union that any unilateral changes by the [Employer]…with respect to the issuance of discipline without first providing the Union with notice and the opportunity to bargain" is unlawful). And, as in *L. Suzio, Peat Manufacturing*, *supra* at 240 fn. 1, and the other cases cited above, the Employer categorically rejected that demand, informing the Union on March 15, 2013 that "the Company intends to appeal the ALJ's decision [finding that the employees had voted for unionization] to the NLRB, as we believe that the decision is both factually and legally incorrect" and that "[u]ntil those issues are finally resolved on appeal…the Company has no obligation to bargain" (GC Exh. 2(b)). With this statement, the Employer refused to bargain over any changes to terms and conditions made thereafter while its appeal to the Board was pending; the Union was entitled to take the Employer at its word and was not obligated to make bargaining demands that the Employer had unequivocally told the Union would be useless. *E.g.*, *Peat*, *supra* at 240 fn. 1.

Moreover, the Employer reiterated its refusal to bargain over any changes, including the discharges at issue, again and again. As in *L. Suzio*, although the Employer did provide information concerning the discharges of Anderson, Clay, and Werstler, it reiterated in its

responses that it did not consider itself obligated to bargain with the Union, explaining that "[t]he fact that [it] ha[d] provided this detailed response to your…letter should in no way be construed that [it] ha[d] any duty to provide this information to you in the future (GC Exh. 7, 9). In addition, the Employer took over four months to respond to the Union's request for information regarding Anderson without explanation, thereby concededly[4] violating Section 8(a)(5) and further affirming that it was refusing to bargain with the Union. The Employer also never provided the Union with notice of these discharges, another signal that it was standing by its refusal to bargain over discipline. And, even after the Board agreed with Judge Green and certified the Union, the Employer again refused the Union's demand to bargain, saying it "will not negotiate unless and until this matter is finally resolved on appeal" to the courts of appeals (GC Exh. 4) and admitting to the Board that it was refusing to bargain with the Union and did not recognize it as its employees bargaining representative. *Oberthur*, 364 NLRB at slip op. at 1.

In these circumstances, the Union had no obligation to make additional, useless demands to bargain over each of the four discharges—the Employer made it extremely clear that it was refusing to bargain with the Union over the discharges as well as over any other changes to employees' terms and conditions. The Employer therefore violated Section 8(a)(5) by refusing to bargain over the discharges of the employees named in the Consolidated Complaint.

IV. CONCLUSION

For the foregoing reasons, the Administrative Law Judge correctly determined that the Union did not waive its right to bargain over the discharges of Albert Anderson, Dan Clay, Harvey Werstler, and Lawrence Bennethum and that the Employer violated the Act by refusing

[4] The Employer has not excepted to Judge Amchan's finding that this delay constituted a refusal to bargain in violation of the Act.

to bargain over those discharges. Therefore, the Employer's lone cross-exception must be rejected.

Respectfully submitted,

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